

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORI A. KELLY,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 2:13-CV-0071-JTR

ORDER GRANTING
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 14, 18. Attorney Joseph Linehan represents Lori A. Kelly (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 4. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff filed an application for Supplemental Security Income (SSI) on October 15, 2010, alleging disability since October 8, 2008. Tr. 171. Plaintiff filed an application for Disability Insurance Benefits on November 10, 2010, alleging disability since October 22, 2008. Tr. 164. Plaintiff alleges disability due to fibromyalgia, back pain, high blood pressure and depression. Tr. 187. The applications were denied initially and upon reconsideration. Administrative Law

1 Judge (ALJ) R.J. Payne held hearings on August 15, 2011, and November 10,
2 2011, Tr. 41-86, and issued an unfavorable decision on December 1, 2011, Tr. 28-
3 35. The Appeals Council denied review on December 17, 2012. Tr. 1-7. The
4 ALJ's December 2011 decision became the final decision of the Commissioner,
5 which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
6 filed this action for judicial review on February 14, 2013. ECF No. 1, 6.

7 **STATEMENT OF FACTS**

8 The facts of the case are set forth in the administrative hearing transcript, the
9 ALJ's decision, and the briefs of the parties. They are only briefly summarized
10 here.

11 Plaintiff was born on November 17, 1959, and was 50 years old on the
12 October 2010 alleged onset dates. Tr. 171. Plaintiff obtained a general
13 equivalency diploma (GED) in the 1980's and last worked as a cook in 2008. Tr.
14 188, 192. Plaintiff reported she was fired from her job as a cook for taking pain
15 medication at work when the company had a policy of "no tolerance for controlled
16 substances." Tr. 285. She testified at the second administrative hearing that the
17 main thing keeping her from currently being able to work is back pain. Tr. 66.
18 Plaintiff stated she has stabbing pain in her lower back and pain that radiates to her
19 legs. Tr. 66-67. She indicated she experiences numbness in both her hands and
20 feet, her neck had been bothering her, she has experienced daily "massive
21 headaches" her whole life, and she has had high blood pressure since her 20's. Tr.
22 67-68, 71, 74. With respect to activities of daily living, Plaintiff stated she went to
23 bed between 9:00 and 11:00 p.m., slept four or five hours at night, and got up
24 around 6:00 or 7:00 a.m. Tr. 80. During the day, she will slowly do things around
25 the house, like laundry, cooking and other housework. Tr. 80-81. She also enjoys
26 reading and watching television during the day. Tr. 80-81.

27 Plaintiff testified she "had a problem with prescription drugs" but had not
28 taken them for a year and a half. Tr. 75. She expressed fear that if she went back

1 to work, the prescription drug problem would resurface. Tr. 75. She indicated she
2 also previously had a problem with alcohol (drinking up to a pint of vodka or
3 whiskey a day), but now will only have a drink every couple of weeks. Tr. 83-84.

4 Minh Vu, M.D., testified as a medical expert at both administrative hearings.
5 Tr. 43-50, 55-66. Dr. Vu opined that Plaintiff had lumbar spondylosis, cervical
6 spondylosis and thoracic spondylosis, confirmed by imaging. Tr. 44-45. He also
7 indicated the record reflected a notation of fibromyalgia, a seizure thought to be
8 due to alcoholism, hypertension without complications, and obesity. Tr. 46. Dr.
9 Vu opined that Plaintiff could do more than light exertion work. Tr. 47. He
10 proposed that Plaintiff could perform medium exertion level work, with the
11 additional limitations of only occasional use of ladders, ropes and scaffolds and the
12 need to avoid concentrated exposure to hazardous machinery and unprotected
13 heights. Tr. 48-49. At the second administrative hearing, Dr. Vu indicated he
14 would change Plaintiff's RFC from "occasional" to "no" use of ladders, ropes and
15 scaffolds. Tr. 64.

16 ADMINISTRATIVE DECISION

17 The ALJ found that Plaintiff had not engaged in substantial gainful activity
18 since October 22, 2008, the alleged onset date. Tr. 30. The ALJ determined, at
19 step two, that Plaintiff had the severe impairment of "significant degenerative
20 changes of the lumbar spine." Tr. 30. At step three, the ALJ found Plaintiff's
21 impairments, alone and in combination, did not meet or medically equal one of the
22 listed impairments. Tr. 32. The ALJ assessed Plaintiff's RFC and determined that
23 she could perform light work with the following limitations: no unprotected
24 heights, no hazardous or moving machinery, and only occasional postural
25 manipulations such as bending, stooping and crouching. Tr. 32.

26 At step four, the ALJ found that Plaintiff is capable of performing her past
27 relevant work as a medical records clerk. Tr. 33-34. In the alternative, at step five,
28 the ALJ concluded that, considering Plaintiff's age, education, work experience

1 and RFC, and based on the Medical-Vocational Guidelines, there are jobs that exist
2 in significant numbers in the national economy that Plaintiff can perform. Tr. 34.
3 The ALJ thus determined that Plaintiff was not under a disability within the
4 meaning of the Social Security Act at any time from October 22, 2008, the alleged
5 onset date, through the date of the ALJ's decision, December 1, 2011. Tr. 34-35.

6 STANDARD OF REVIEW

7 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the Court set
8 out the standard of review:

9 A district court's order upholding the Commissioner's denial of benefits is
10 reviewed de novo. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The
11 decision of the Commissioner may be reversed only if it is not supported by
12 substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d
13 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a
14 mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way,
15 substantial evidence is such relevant evidence as a reasonable mind might accept
16 as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401
17 (1971). If the evidence is susceptible to more than one rational interpretation, the
18 Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180
19 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599
20 (9th Cir. 1999).

21 The ALJ is responsible for determining credibility, resolving conflicts in
22 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
23 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo,
24 although deference is owed to a reasonable construction of the applicable statutes.
25 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

26 It is the role of the trier of fact, not this Court, to resolve conflicts in
27 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one
28 rational interpretation, the Court may not substitute its judgment for that of the

Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence exists to support the administrative findings, or if conflicting evidence exists that will support a finding of either disability or non-disability, the Commissioner's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *see, Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents him from engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work; and (2) specific jobs exist in the national economy which claimant can perform. *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make an adjustment to other work in the national economy, a finding of "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(i-v), 416.920(a)(4)(i-v).

ISSUES

The question presented is whether substantial evidence exists to support the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards. Plaintiff contends that the ALJ erred because she is more

1 limited from a physical standpoint than what was determined by the ALJ. ECF
 2 No. 14 at 7. Plaintiff additionally provides a brief argument that the ALJ failed to
 3 properly consider and reject her testimony regarding the limitations from her
 4 impairments. ECF No. 14 at 9-10.

5 **DISCUSSION**

6 **A. Physical Limitations**

7 Plaintiff asserts that the ALJ improperly rejected the opinion of Stacy Jarvis,
 8 PA-C, regarding her physical limitations. ECF No. 14 at 8-11. Plaintiff
 9 specifically argues that Ms. Jarvis' October 20, 2011 letter, Tr. 647, demonstrates
 10 she is more limited from a physical standpoint than what was determined by the
 11 ALJ in this case. *Id.*

12 As noted above, the ALJ determined that Plaintiff retained the RFC to
 13 perform light work¹ with the following limitations: no unprotected heights, no
 14 hazardous or moving machinery, and only occasional postural manipulations such
 15 as bending, stooping, crouching, etc. Tr. 32. Ms. Jarvis, however, noted in a letter
 16 dated October 20, 2011, that "based on her review of the claimant's recent medical
 17 records and current diagnosis, it was her opinion that working in a traditional
 18 setting for more than 3-4 hours a day would be inadvisable and would exacerbate
 19 her pain and symptoms." Tr. 647. The ALJ rejected Ms. Jarvis' opinion in this
 20 case. Tr. 33.

21 The ALJ first indicated that Ms. Jarvis, a certified physician assistant, is not
 22 an acceptable medical source. Tr. 33. Only acceptable medical sources can give
 23 medical opinions. 20 C.F.R. § 416.927(a)(2). Ms. Jarvis' testimony and opinions
 24 do not qualify as "medical evidence . . . from an acceptable medical source" as
 25

26 ¹Light level work involves lifting no more than 20 pounds at a time with
 27 frequent lifting or carrying of objects weighting up to 10 pounds. 20 C.F.R. §§
 28 404.1567(b), 416.967(b).

1 required by the Social Security Regulations. 20 C.F.R. §§ 404.1513, 416.913.
2 Plaintiff concedes that Ms. Jarvis is not an acceptable medical source, but argues
3 that Ms. Jarvis' "other source" opinion should have been given weight by the ALJ
4 as evidence demonstrating how Plaintiff's symptoms affect her ability to work.
5 ECF No. 14 at 10. To reject "other source" evidence, an ALJ must provide
6 germane reasons for doing so. *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217,
7 1224 (9th Cir. 2010).

8 The ALJ relied on the opinions of acceptable medical sources of record
9 which consistently contradict the opinion of Ms. Jarvis. As noted by the ALJ, a
10 February 26, 2010, psychological consultative examination with Samantha
11 Chandler, Psy.D., revealed Plaintiff was "completely and totally independent." Tr.
12 31, 288. Plaintiff "described normal and common activities of daily living," Tr.
13 31, 286-287, and indicated she only had difficulty lifting more than 30 pounds, Tr.
14 284. Furthermore, a March 13, 2010, physical examination with Robert Bray,
15 M.D., indicated that Plaintiff reported low back pain, but her examination was
16 entirely unremarkable. Tr. 31, 289-293. Dr. Bray opined that Plaintiff would be
17 limited to light exertion level work with no postural, manipulative or
18 environmental restrictions. Tr. 31, 292-293. State agency reviewing consultant
19 Tony Bingaman opined on March 25, 2010, that Plaintiff should be limited to light
20 exertion level work, but should avoid concentrated exposure to hazards
21 (machinery, heights, etc.) and should only occasionally climb ramps/stairs and
22 ladders/ropes/scaffolds. Tr. 308-315. Finally, the medical expert, Dr. Vu, testified
23 that, consistent with Dr. Bray and the state agency consultant, Plaintiff could
24 perform at least light exertion level work, with the additional limitations of no use
25 of ladders, ropes and scaffolds and no concentrated exposure to hazardous
26 machinery and unprotected heights. Tr. 47-49, 64. The ALJ did not err by relying
27 on the opinions of the foregoing acceptable medical sources over the opinion of
28 Ms. Jarvis, a non-acceptable medical source.

1 The ALJ also indicated Ms. Jarvis' assessment was based solely on a review
2 of Plaintiff's "very limited medical records." Tr. 33. An ALJ may discredit
3 physicians' opinions that are conclusory, brief, and unsupported by the record as a
4 whole, *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992), or by objective
5 medical findings, *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). Ms.
6 Jarvis wrote that her opinion was only based on Plaintiff's "recent medical records
7 and current diagnoses." Tr. 647. Consequently, Ms. Jarvis' opinion in the October
8 20, 2011, letter was, as indicated by the ALJ, based on "limited medical records,"
9 as opposed to a thorough review of the entirety of Plaintiff's medical history.
10 Moreover, Ms. Jarvis' letter offered no objective medical findings to support the
11 opinion of significant work related limitations noted in the letter. *Tonapetyan*, 242
12 F.3d at 1149.

13 Based on the foregoing, the ALJ provided germane reasons for rejecting Ms.
14 Jarvis' "other source" opinion that if Plaintiff worked more than three to four hours
15 a day, it would exacerbate her pain and symptoms. Tr. 647. The record does not
16 support a more restrictive finding than Plaintiff being limited to a range of light
17 exertion level work. Accordingly, the undersigned finds the ALJ's physical RFC
18 determination is in accord with the weight of the record evidence and free of legal
19 error.

20 **B. Plaintiff's Credibility**

21 Plaintiff also provides a brief argument that the ALJ erred by failing to
22 properly consider her subjective complaints. ECF No. 14 at 9-10. Plaintiff argues
23 that the ALJ failed to state specific reasons to reject her testimony regarding "her
24 limited ability to sit, stand, walk, as well as lift and carry, and her need for breaks
25 frequently throughout the day." ECF No. 14 at 9.

26 It is the province of the ALJ to make credibility determinations. *Andrews v.*
27 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be
28 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231

1 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying
2 medical impairment, the ALJ may not discredit testimony as to the severity of an
3 impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157
4 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the
5 ALJ's reasons for rejecting the claimant's testimony must be "clear and
6 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General
7 findings are insufficient: rather the ALJ must identify what testimony is not
8 credible and what evidence undermines the claimant's complaints." *Lester*, 81
9 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

10 In this case, the ALJ found Plaintiff's medically determinable impairments
11 could reasonably be expected to cause the alleged symptoms; however, Plaintiff's
12 statements concerning the intensity, persistence and limiting effects of the
13 symptoms "are only supported by recent imaging and not particularly supported by
14 her limited treating records." Tr. 33.

15 The ALJ thus indicated that the objective medical evidence did not support
16 her allegations of total disability. A lack of supporting objective medical evidence
17 is a factor which may be considered in evaluating a claimant's credibility, provided
18 it is not the sole factor. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). As
19 discussed above, the ALJ properly assessed the medical records in this case.
20 Plaintiff's allegations of significant limitations on her ability to sit, stand, walk, lift
21 and carry, and need for frequent breaks throughout the day are not consistent with
22 the opinions of the acceptable medical sources of record which demonstrate
23 Plaintiff is capable of performing at least light exertion level work, with certain
24 postural and environmental restrictions. *Supra*. The credible medical evidence of
25 record does not support Plaintiff's claim of disabling limitations. It was
26 appropriate for the ALJ to conclude that the objective medical evidence does not
27 support the level of limitation Plaintiff has alleged in this case.

28 ///

1 The ALJ also noted that Plaintiff's "own estimated/assessed functional
2 capacity was not inconsistent with the [ALJ's RFC] assessment." Tr. 33. Plaintiff
3 wrote in her December 9, 2009, function report that she was capable of lifting
4 approximately 20 to 30 pounds. Tr. 203. She also reported she could walk two
5 miles before needing to stop and rest for about five to 10 minutes and then could
6 resume walking.² Tr. 203. At that time, Plaintiff also indicated she was
7 babysitting her grandchildren when her daughter was at work. Tr. 198. This
8 involved walking to the bus stop, making dinner, doing baths and helping with
9 homework. Tr. 198. She further reported cleaning her house twice a week for two
10 to three hours and shopping for groceries on a weekly basis. Tr. 200. On
11 examination with Dr. Chandler, Plaintiff indicated she does the dishes, makes her
12 bed daily, cleans the bathroom once a week, takes the trash out as needed, does
13 both her and her mother's laundry two times a week, and goes grocery shopping at
14 least once a week. Tr. 287. On examination with Dr. Bray, she reported she took
15 care of her own personal needs and all of her own household chores. Tr. 290. At
16 the administrative hearing, Plaintiff testified she was capable of driving her manual
17 transmission vehicle and had driven the fifty-minute drive to the hearing that day,
18 without stopping to rest. Tr. 70. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)
19 (it is well-established that the nature of daily activities may be considered when
20 evaluating credibility). The level of functioning reported by Plaintiff throughout
21 the record is not necessarily inconsistent with the ALJ's physical RFC assessment
22 in this case.

23 The ALJ is responsible for reviewing the evidence and resolving conflicts or
24 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.

25 ²At the administrative hearing, Plaintiff testified she could only walk one
26 block before needing to stop and rest. Tr. 73. On examination with Dr. Chandler,
27 she reported her average day consisted of morning walks of two blocks to the store
28 and two blocks back home. Tr. 286.

1 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in
2 evidence. *Richardson*, 402 U.S. at 400. The Court has a limited role in
3 determining whether the ALJ's decision is supported by substantial evidence and
4 may not substitute its own judgment for that of the ALJ even if it might justifiably
5 have reached a different result upon de novo review. 42 U.S.C. § 405(g).

6 After reviewing the record, the undersigned finds the reasons provided by
7 the ALJ for discounting Plaintiff's subjective complaints are clear, convincing, and
8 fully supported by the record. Accordingly, the ALJ did not err by concluding that
9 Plaintiff's assertions of disabling functional limitations were not fully credible in
10 this case.

11 CONCLUSION

12 Having reviewed the record and the ALJ's findings, the Court concludes the
13 ALJ's decision is supported by substantial evidence and free of legal error.

14 Accordingly,

15 IT IS ORDERED:

16 1. Defendant's Motion for Summary Judgment, **ECF No. 18**, is
17 **GRANTED**.

18 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

19 The District Court Executive is directed to file this Order and provide a copy
20 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant
21 and the file shall be **CLOSED**.

22 DATED February 3, 2014.



A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE